80-541

Supreme Court, U. S.
FILED
SEP 30 1980
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

No. _____

COUNTY OF FAIRFAX, VIRGINIA, et al.,
Petitioners,

v.

UNITED STATES OF AMERICA
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

DAVID T. STITT
County Attorney

JACK L. GOULD
ODIN, FELDMAN & PITTLEMAN, P.C.
P. O. Box 367
10505 Jones Street
Fairfax, Virginia 22030
(703) 385-7700

QUESTION PRESENTED

Whether the Circuit Court erred in reversing the trial court's determination that the appropriate labor pool was best determined by considering the geographic location of applicants together with demographic characteristics of each geographic area involved -- including the qualifications of applicants -- and adopting, instead, an applicant flow analysis that compared the number of applicants recruited during a year of aggressive affirmative action, with the number hired over an aggregated five year period during which such affirmative action as was engaged in was significantly less aggressive and not as well coordinated.

TABLE OF CONTENTS

	Page
Opinion Below	2
Jurisdiction	2
Question Presented.	2
Statement of the Case	3
Reasons for Granting the Writ	5
Conclusion	18
Appendix	

TABLE OF CITATIONS

Cases: Page

Detroit Police Officers' Ass'n. v. Young
608 F.2d 671 (6th Cir. 1979). 6

EEOC v. Local 14 Intn'l. Union of Op. Eng.
553 F.2d 251 (2d Cir. 1977) 6

EEOC v. United Virginia Bank/Seaboard National
615 F.2d 147 (4th Cir. 1980) . . 16, 17

Garcia v. Rush Presbyterian Medical Ctr.
___ F.Supp.___, 23 FEP Cases 177, 189 (N.D. Ill. 1980) 10

Hazelwood School District v. United States
433 U.S. 299 (1977) . 5, 6, 10, 11, 15, 16

Kinsey v. First Regional Securities, Inc.
557 F.2d 830 (D.C. Cir.1977) . . . 6

Statutes:

28 U.S.C. §1254(1) 2

31 U.S.C. §1242 4

42 U.S.C. §3766 4

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. _____

COUNTY OF FAIRFAX, VIRGINIA, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners County of Fairfax, Virginia, et al., (hereinafter referred to as "the County") respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on July 23, 1980.

OPINION BELOW

The opinion of the Court of Appeals appears in the Appendix hereto, as does the memorandum opinion filed by the District Court for the Eastern District of Virginia, Alexandria Division.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on July 23, 1980. A timely petition for rehearing en banc was denied by the Circuit Court on August 28, 1980, and a Motion for Stay of Mandate pending application to this Court for a Writ of Certiorari was denied September 5, 1980. This Petition for Certiorari was filed within ninety days of the order denying the petition for hearing en banc. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the Circuit Court erred in reversing the trial court's determination that the appropriate labor pool was best deter-

mined by considering the geographic location of applicants together with demographic characteristics of each geographic area involved -- including the qualifications of applicants -- and adopting, instead, an applicant flow analysis that compared the number of applicants recruited during a year of aggressive affirmative action, with the number hired over a an aggregated five year period during which such affirmative action as was engaged in was significantly less aggressive and not as well coordinated.

STATEMENT OF THE CASE

On December 18, 1978, the Attorney General filed suit on behalf of the United States against the County of Fairfax, Virginia and certain government officials and agencies within the County. The suit alleged that the County and others had violated federal law by engaging in a pattern or practice of employment discrimination against blacks and women. The named defendants, which will be referred to herein as "the County", are the County of Fairfax, the County Executive, the members of the Board of Supervisors of the

County, the Office of Sheriff and Jail, the Sheriff, the Fairfax-Falls Church Community Services Board and its Chairman and Executive Director, and the Fairfax County Park Authority and its Chairman and Director.

The amended complaint alleged that Petitioners discriminated against blacks and women in recruitment, hiring, assignments, and promotions. The amended complaint also alleged use of unlawful tests and the withholding of information from the Department of Justice that the County was obliged to provide pursuant to regulations implementing the non-discrimination provisions of Revenue Sharing Act (31 U.S.C. §1242) and Crime Control Act (42 U.S.C. §3766). Trial was before the Honorable Albert V. Bryan, Jr., on April 9-11, 1979. The trial court's order and memorandum opinion were filed April 20, 1979, entering judgment largely for the County. The United States filed a notice of appeal on June 19, 1979, and the County cross appealed on July 3, 1979. On May 5, 1980, argument was had before a panel of the Fourth Circuit Court of Appeals, which Court issued its

decision in the matter July 23, 1980. The Fourth Circuit vacated the judgment of the District Court and remanded the case.

REASONS FOR GRANTING THE WRIT

The decision below is offensive to the principles articulated in Hazelwood School District v. United States, 433 U.S. 299 (1977).

I.

In Hazelwood this Court stated that it is the duty of the District Court to determine whether "sufficiently reliable applicant flow data are available" in a given case. Id. at n. 21 and at 312. After a thorough discussion of the issue in the instant case, the trial court determined that the applicant flow data offered by plaintiff was not the most reliable available in the circumstances of this case. Memorandum Opinion, pp. 8-10. The County submits that Hazelwood makes clear this Court's view

that the best statistical comparison is between the race or sex composition of the employer's work force and the race or sex composition of the qualified population in in the relevant labor market. Id. at 308. See, also, n.17 where the Court made certain observations ". . . to highlight the importance of the choice of the relevant labor market area." The inference to be drawn is that where the labor market area can be reliably ascertained, it should be utilized. See, also, EEOC v. Local 14 Intn'l Union of Op. Eng., 553 F.2d 251 (2d Cir. 1977); Kinsey v. First Regional Securities, Inc., 557 F.2d 830 (D.C. Cir. 1977); Detroit Police Officers' Ass'n v. Young, 608 F.2d 671 (6th Cir. 1979).

II.

Ample reasons existed for the trial court to reject the application of 1978 applicant flow data to hires over the period 1974-1978. See Memorandum Opinion, pp. 8-10. The trial Court found, for example, that this approach would tend to penalize the County in light of the County's agres-

sive affirmative action plan in 1978.[1] However, the Court of Appeals stated that the District Court's finding that the 1978 affirmative action plan resulted in larger percentages of women and black applicants in 1978 than in earlier years, was not substantiated by the evidence. Slip. Op. pp. 10 and 18. Significant evidence that was introduced on this point was apparently not considered by the Fourth Circuit. For example, evidence was introduced that approximately four times more blacks were certified to the police department in 1978 than in 1977 because of the 1978 affirmative action plan. (A.396.)[2]

---

[1] The trial court's finding that the affirmative action plan was adopted in October 1977 ". . . before the County was aware of the government's investigation", Memorandum Opinion, p. 15, was not questioned by the Court of Appeals or, for that matter, by the Attorney General.

[2] A. - refers to the appropriate pages in the appendix filed below.

The 1978 AAP advanced recruitment of minorities and women for Police Officer jobs by use of a weekly special testing day. (A. 397-398.) Further, on site tests for entry level police jobs were conducted at primarily black educational institutions. (A. 399.) With the new 1978 AAP the police department recruited through 15 black radio stations, 7 Hispanic stations, and a number of Korean stations (A. 399-440), and advertised more widely in newspapers than before. (A. 400.) Evidence was introduced to show that through a joint effort with the International Association of Firefighters (IAFF) three times the number of black applicants for fire fighter jobs were recruited in 1978 than had been recruited previously. (A. 437-438.) The extent of the minority recruitment engaged in for firefighter applicants during 1978 was dramatized in the testimony of the IAFF representative:

> We go to minority churches and make presentations, colleges and universities, especially where there are large numbers of minorities, man-to-man contact on the street, pool

> rooms, bars, flyers, posters. Those are our basic recruitment techniques.

(A. 511.) And the county's then acting Personnel Director addressed the beefed-up recruitment engaged in during 1978 (expanded mailing lists, A. 521; more flexible job requirements to attract more minorities, A. 524; and the minority intern recruitment efforts, A. 527-528.). Accordingly, not only was it incorrect for the Fourth Circuit to state that no evidence was offered to demonstrate the comparative effectiveness of the 1978 AAP, but there was ample record of evidence to support the trial court's finding that because the 1978 AAP was so much more effective than past affirmative action efforts, use of 1978 applicant flow as a base of comparison with hires in past years penalizes the County for its 1978 AAP activity.3/

3/ The County would also note that the manner in which the applicant flow data were used was improper. Rather than compare 1978 applicant flow data to each of the subject years individually, plaintiff compared these data to an aggregation of the years 1974 through 1978. Each of the subject years constituted a large enough sample size and there was therefore no statistically sound reason for this aggregation. (A. 311, 313-314.) Further, and most importantly, the very act of aggregation itself tends to

(Continued on next page)

III.

While it is of course the Attorney General's burden to make his prima facie case regardless of whether the County's zip code analysis is accepted by the Court, the County nevertheless believes that its methodology for determining the appropriate labor pool is responsive to the principles articulated in Hazelwood and is sound. This Court has unequivocally held that the role of statistics in employment discrimination cases is correctly conceived when the employer's work force is compared to the proper segments of the population in the relevant labor market:

> The Court of Appeals was correct in the view that a proper comparison was between the racial composition of Hazelwood's teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market.

3/(continued) magnify any imbalance in the figures and therefore unfairly weights the results against the County. Garcia v. Rush Presbyterian Medical Ctr., ___F.Supp.___, 23 FEP Cases 177, 189 (N.D. Ill. 1980) (The court found a similar aggregation to be error resulting in ". . . findings of statistically significant under employment, when under correct statistical techniques, none will be found.")

Hazelwood School District v. United States, 433 U.S. at 308 (fn. omitted). The Hazelwood case was in fact remanded to the lower court for a determination of the relevant labor market area, id., 313, something the trial court in this case has already done. Implicit in the Hazelwood opinion is the point that proper labor market figures are not likely to be found in an existing table or set of figures. The Hazelwood case also made clear that the determination of the relevant labor market area is a question for the trier of fact, id., 312, which may not be overturned unless clearly erroneous.

For purposes of this petition suffice it to say that the County's zip code analysis essentially involved the County ascertaining the geographic distribution of persons who applied for employment with the County in 1978 by use of their zip codes. Once this was accomplished, the distribution of applicants was broken down into percentages in each area for each of the eight EEO 4

categories.[4]/ As described by the trial judge in his memorandum opinion,

> Then, by resort to 1970 census data, the approximate availability of qualified females, blacks and other minorities in the eight categories at issue for those geographic areas listed above was determined. A weighted comparison was then made to obtain a model reflective of the demographic composition of the labor pool from which the defendants could be expected to draw their employees.

Memorandum opinion at page 12.

The Appeals Court was critical of the use of employed and experienced unemployed figures for blacks and women which, the Court stated, understate availability by excluding those who never worked. As noted in the trial court's opinion, the Attorney General elected to present his statistical

---

[4]/ The EEO 4 categories are as follows: officials and administrators, professionals, technicians, protective service workers, para-professionals, clericals, skilled-craft workers, and service and maintenance workers.

case using broad EEO-4 job categories, rather than present evidence as to specific jobs. Memorandum opinion at page 5. Use of these very broad categories required use of similarly broad demographic data for comparison purposes. In fact, in presenting its standard metropolitan statistical area analysis (which was rejected by the trial court and the Court of Appeals for for unrelated reasons) the Attorney General also relied on broad demographic data including 1970 census data. Further, as is apparent from defendants' Exhibit 50 consisting of the demographic work sheets used in the zip code analysis, high school graduation and lower educational achievement were used as the qualification criteria for unskilled entry level jobs. Therefore not only was there no understatement of the available labor market as a result of the criteria used by the County in its zip code analysis but, moreover, use by the County of the Washington D.C. SMSA figures to calculate black experienced unemployed for the Northern Virginia and suburban Maryland counties (A. 458-459,

474) would have tended to overstate the number of black persons available for employment.

The Court of Appeals was also critical because it perceived that the supervisor of the ill demographer who was unable to testify was unable to identify the source for any data included in defendants' Exhibit 50.[5]/ (Slip. Op. at n. 10.) This is simply inaccurate and should not be permitted to provide even a partial basis for the Court of Appeals reversal of the trial court on the zip code analysis issue. (Data taken from published tables, A. 457; derivation of data explained, A. 458-459; data taken from social and economic, general characteristics, census track tapes, and plaintiff's exhibit 34, A. 461; derivation of experienced unemployed figures, A. 474-475; explanation of demographer's approach, A. 479.) The County believes

---

[5]/ The demographer was unable to testify as planned because of his and his child's illness. (A. 451.) His supervisor testified, however, and the demographer's worksheets had been provided to plaintiff, were before the court, and were received in evidence. (A. 1718-1745.)

that not only was there a full opportunity to examine the basis for the zip code analysis but that the method provides the most complete picture of the available labor market, including qualifications of those available. In the County's view it is responsive to the invitation issued by this Court in Hazelwood for parties to employment discrimination suits to find a better way to ascertain the available labor pool than using applicant flow which does not take qualifications into account.

One last issue deserves brief discussion. The Court of Appeals appears to have been motivated to reject the County's zip code analysis and accept the extrapolated aggregated applicant flow method presented by the Attorney General in part because, as the Court of Appeals stated, "The County began adequate record keeping practices only after the instigation of this litigation." (Slip. Op. n. 11.) This is a misstatment of fact. The record clearly shows that the County retained all required data for the entire year of 1978.

(A. 239, 256, 540.) This suit was not filed until December 19, 1978. (A. 3.) Moreover, the record is uncontradicted that complete data were kept to enable the County to monitor its 1978 AAP. (A. 517.) And it is further undisputed that the 1978 AAP was adopted by the County before the County was even aware of the Attorney General's investigation of the County's employment practices. (Memorandum of Op. at p. 15.) Regardless of the reasons why the facts were not correctly stated in the Court of Appeals' opinion, the County's employment practices should not be measured by an erroneous standard based even in part on the erroneous assumption that adequate records were not available for the Attorney General to have put together a more complete and accurate measurement of the available labor pool.6/

The Fourth Circuit decision offends more than the principles enunciated in Hazelwood. It also offends common sense. To

---

6/ In this regard petitioners see a contradiction between the opinion of the Fourth Circuit in EEOC v. United Virginia Bank/Seaboard National, 615 F.2d 147 (4th Cir. 1980)

penalize an employer who has voluntarily embarked on an aggressive, innovative, and effective affirmative action plan by comparing the number of applicants attracted during the year of aggressive affirmative action with the number of hires during years when no such aggressive affirmative action plan was in effect not only disadvantages the employer but can only serve as a warning to other employers that they engage in voluntary affirmative action at their peril. The decision makes even less sense when it is shown that an alternative methodology of ascertaining the correct labor pool is available.

6/(continued) and the instant case. In the United Virginia Bank case the EEOC was critized for failing to use available data to prove that black and female applicants were qualified for the jobs applied for. The same situation exists in the case at bar, i.e., notwithstanding that qualifications data were available for 1978 applicants no attempt was made by the Attorney General to show that those who applied were qualified, yet the Fourth Circuit accepted the Attorney General's theory of a prima facie case this notwithstanding.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

COUNTY OF FAIRFAX,
VIRGINIA, et al.,

BY: _____
Counsel

DAVID T. STITT,
County Attorney

BY: _____
JACK L. GOULD
ODIN, FELDMAN & PITTLEMAN,
P.C.
Box 367
10505 Jones Street
Fairfax, Virginia 22030
(703) 385-7700

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of September, 1980, three copies of the Petition for a Writ of Certiorari were mailed, postage prepaid, to Justin W. Williams, United States Attorney, 117 S. Washington Street, Alexandria, Virginia 22314 and Dennis J. Dimsey, Esquire, Department of Justice, Washington, DC, 20530, Counsel for the Respondent. I further certify that all parties required to be served have been served.

Jack L. Gould

JACK L. GOULD
Counsel for Petitioners
ODIN, FELDMAN & PITTLEMAN, P.C.
Box 367
10505 Jones Street
Fairfax, Virginia 22030
(703) 385-7700

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

V. CIVIL ACTION NO. 78-862-A

COUNTY OF FAIRFAX, VIRGINIA
et. al.,

Defendants.

ORDER

For the reasons set forth in the Memorandum Opinion this day filed, it is ORDERED:

(1) That those defendents who are in any way involved with the employment of women in EEO-4 job category 8, their officers, agents, employees, successors, and all persons in active concert with any of them are hereby permanently enjoined from engaging in any act, pattern or practice with respect to hiring which has as its purposes or effect discrimination on account of sex against any applicant or potential applicant for employment within EEO-4 job category 8.

(2) That except to the extent granted by this Order, the prayers for relief contained in the Amended Complaint are denied.

(3) That each party shall bear its own costs.

(4) That this Order is final, but the Court retains jurisdiction of the action for such further relief as may be appropriate to enforce

the opportunity of employment mandated by Paragraph 1 of this Order.

/s/ Albert V. Bryan, Jr.

United States District Judge

Alexandria, Virginia
April 20th, 1979

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

V. CIVIL ACTION NO. 78-862-A

COUNTY OF FAIRFAX, VIRGINIA,
et. al.,

Defendants.

MEMORANDUM OPINION

This Title VII action (Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. §2000e, to extend coverage to include State and Local governments) was brought by the Attorney General on behalf of the United States pursuant to 42 U.S.C. §2000e-6(a) against Fairfax County, Virginia (the County) and certain State and local governmental agencies within the County[1/] alleging

---

[1/] *Named as defendants, in addition to the County, are the County Executive; the members of the Board of Supervisors of the County; the Sheriff of the County and his office; the Fairfax-Falls Church Community Services Board and its chairman and Executive Director; and the Fairfax County Park Authority and its chairman and Director. Employment for all of these agencies is handled through the County or pursuant to the procedures adopted by the County.*

that the County and these agencies have engaged in a pattern and practice of discriminating against blacks and women because of race and sex so as to deprive them of employment opportunities.

Also asserted is the claim that the County has refused to provide information to the Department of Justice relevant to a determination whether the County is in compliance with the nondiscrimination provisions of the State and Local Fiscal Assistance Act of 1972 (31 U.S.C. §1242) as amended in 1976 (Pub. L. 94-488, October 13, 1976), the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. §3766) as amended in 1976 (Pub. L. 94-503, October 15, 1976), and the regulations promulgated pursuant to these acts, respectively 31 CFR, Subpart E, §51.59 and 28 CFR Subpart D, §42.207.

While broad relief, including "make whole" remedies such as back pay, adjusted seniority and fringe benefits to identifiable victims of discrimination, is sought in the amended complaint, at oral argument and in its post-trial brief the plaintiff requested:

(a) A general injunction against discrimination in employment opportunities on account of race or sex;

(b) An injunction requiring record keeping and disclosure as required by the regulations mentioned above; and

(c) The setting of numerical percentage hiring goals for blacks and women in certain categories of employment until the overall percentage of employment in those categories reaches an acceptable level.

(d) Specific relief to identifiable victims of discrimination.

The case was tried to the Court on April 9, 10 and 11, 1979, and the Court took the matter under advisement in order to review the exhibits, depositions and post-trial submissions of the parties.

Record Keeping and Disclosure of Information

Insofar as this aspect of the case is concerned the Court adopts the proposed findings of fact contained in Paragraphs 97 through 120 of the United States' Proposed Findings of Fact, which are attached as Appendix A.

It is clear that prior to January 1, 1978, and subsequent to the effective date of some of the regulations applicable to the County, the County had failed to maintain records required by those regulations to be preserved. It is likewise apparent now (although there were some conflicting district court holdings at the time) that the refusal of the County to supply the Department of Justice with the information it requested was in error. However, the County has shown that beginning January 1, 1978 the required records have been kept and the plaintiff, albeit partially as a result of this suit, now has every document in the way of records which the County has. Moreover, there is every indication that the County will continue to maintain and supply, or have available for inspection by the appropriate agency, the records required by the regulations. It is indeed unfortunate that

records were discarded,[2/] but no injunction can cause their reproduction; and in the view of the Court no injunction is necessary to insure further compliance with the record keeping and disclosure requirements of the regulations.

Discrimination

The order of proof in Title VII pattern and practice cases, under now familiar principles, is that the plaintiff has the initial burden of proving a prima facie[3/] case of purposeful discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). If it does so, the burden of rebutting the case shifts to the defendants.

The employment practices of approximately 50 departments or agencies of the County are involved in this action. The plaintiff has used, for comparison purposes, eight categories of employees. The categories coincide with EEO-4 categories and are: (1) Officials and Administrators, (2) Professionals, (3) Technicians, (4) Protective Service, (5) Para-professionals,

---

[2/] *The Court declines, however, the plaintiff's request that because of the County's activities in discarding the records, the inference be drawn that these records would be unfavorable to the County. There is no evidence that the actions of the County in this regard were wilful or done in bad faith.*

[3/] *The Court adopts the traditional definition of a prima facie case, i.e., a state of facts, from which the most reasonable inference to be drawn is that there was purposeful discrimination.*

Office and Clerical Workers, (7) Skilled Craft Workers, and (8) Service and Maintenance Workers.[4/]

The plaintiff has undertaken to establish a prima facie case through the use of statistics which allegedly show a substantial disparity between the make-up of the defendants' work force and the labor pool from which the defendants are expected to draw their employees.

For the year 1978 the regular permanent, regular probational and regular provisional employee work force of defendants, was broken down into the eight categories for employees within the agencies and departments involved in this action as follows:

Category	Total	White	Black	Male	Female
1	149	142 (0.953)	4 (0.027)	129 (0.866)	20 (0.134)
2	782	735 (0.940)	25 (0.032)	598 (0.765)	184 (0.235)
3	536	498 (0.929)	24 (0.045)	442 (0.825)	94 (0.175)
4	1446	1350 (0.934)	79 (0.055)	1264 (0.874)	182 (0.126)
5	51	49 (0.961)	2 (0.039)	35 (0.686)	16 (0.314)
6	858	785 (0.915)	45 (0.052)	68 (0.079)	790 (0.921)
7	575	526 (0.915)	30 (0.952)	566 (0.984)	9 (0.016)
8	599	427 (0.713)	167 (0.279)	577 (0.963)	22 (0.037)
Totals	4996	4512 (0.903)	376 (0.075)	3679 (0.736)	1317 (0.264)

The plaintiff has tabulated the fluctuations in the percentages of blacks and women in the defendants' labor

---

[4/] *Pursuant to %709(c) of Title VII, 42 U.S.C. % 2000e-8(c), all state and local governments who employ more than 15 employees are required to file a statistical report revealing equal employment opportunities in their jurisdictions. For the sake of uniformity, consistency, economy and completeness, the Equal Employment Opportunity Commission issues form EEO-4 by which reporting agencies structure their evaluations. The EEO-4 breaks down all job classifications into eight classes.*

force for the eight categories for the years 1974 through 1978 as set out in Appendix A of Plaintiff's Exhibit 23. For comparison purposes, however, the plaintiff has concentrated on the statistics for the year 1978.

The 4996 employees shown above are divided among the approximate 50 departments and agencies as shown in the attached Appendix B.

Necessary to the decision as to whether there is a disparity is a determination as to which segments of the defendants' work force will be used for comparison purposes. The government has presented its statistical case using the eight EEO-4 categories of employees mentioned. These eight categories as indicated, however, include employees of some fifty or more County agencies and departments. Employees of an agency or department do not all appear in the same category. There is a further division of employees into job classifications. There are 397 job classifications within all the County agencies and departments. What the government has done in the presentation of its statistics is to single out and highlight a job classification which itself has a minimal percentage of blacks or females without correlating that job classification with the other job classifications which are used to make up the statistical data for a particular job category.

As an example, the overall percentage of female employees

in category 4 during 1978 was 12.6% and of blacks 5.5%[1]. The government cites statistics, however, within the Fire and Rescue Service (some, but not all of whose employees are included in category 4) which show such a low number of blacks and females now employed or hired in 1978 in certain job classifications, e.g., firefighter I, that it can be argued that, as to that job classification, there is a disparity no matter which labor pool is used for comparison. Aside from the distortion presented by using the number of hires without knowing the number of applicants, singling out one sub-category and using it as an argument for an overall finding of disparity is a misleading use of the statistical basis upon which the overall comparisons were made.

Admittedly, a closer case for using sub-categories is presented in the instance of category 4 where the total number of employees (1446) may be sufficiently large numerically to note statistically significant disparities; but the Court concludes that each of the eight categories should be looked at as a whole. To rule otherwise is to require an employer to attempt statistical parity for each of its job classifications. For the County this amounts, as indicated, to a total of 397. Presumably the EEO-4 job categories were designed with a view to providing the greatest number of

---

[1] *The number of employees in category 4 is listed as 1446. On the other hand the totals given for the Sheriff's Office and Jail (242), Police (1039), and Fire and Rescue (800) departments, presumably within category 4, obviously exceed the listed number for category 4. Obviously there are included in some or all of these departments persons not identifiable with category 4.*

categories consistent with manageability from an employer's standpoint on the one hand and monitoring by the EEOC of the make-up of the employer's work force on the other hand. As indicated, while a case can be made for separating the Police and Fire and Rescue departments into sub-categories, that has not been done by the EEOC, it was not done by the government at trial by its comparisons with either the SMSA or applicant flow data, and it was not done by the County in its preparation to meet the government's case at trial. And the Court is not persuaded to do it by the government's discrete selection of statistical data as to certain job classifications and departments (some of which may or may not be within the same job categories) which in isolation contain minimal or non-existent employment of blacks and females.

Accordingly, the Court will look to the percentage of females and blacks employed in each job category as a whole for comparison purposes.

Crucial to the determination whether there is the substantial disparity of which plaintiff complains is the determination of the proper labor pool with which to compare the defendants' work force. The plaintiff has approached this in two ways. First it has used the Washington Standard Metropolitan Statistical Area (SMSA) statistics based on 1970 census data and a 1974 Department of Labor report. Its second approach is the use of applicant flow statistics. The plaintiff has also pointed to the disproportionate number of females in job category 6 (Clerical) and

disproportionate number of blacks in job category 8 (Service and Maintenance Workers), but the Court concludes that it is as reasonable to infer that these statistics are a result of preference as of discrimination.

SMSA

The SMSA includes the Virginia counties of Fairfax, Arlington, Prince William and Loudoun; the Virginia cities of Alexandria and Falls Church; the Maryland counties of Prince Georges and Montgomery; and the District of Columbia.

For the year 1970, the Bureau of the Census, United States Department of Commerce, reported that the labor force for the Washington SMSA was 24.0% black and 40.4% female (PX 33, tables 85, 92).

For the year 1974, the District of Columbia Department of Labor reported that the labor force for the Washington SMSA was 25.8% black and 42.0% female (PX 128).

Comparison of these percentages with the percentages of blacks and females in the defendants' labor force reveals a significant disparity between the labor pool available in the SMSA and the make-up of that work force - both overall and for the eight specific categories here involved. The percentages in the specific job categories are also derived from the Bureau of Census data.

The Court concludes, however, that the SMSA is not the appropriate labor pool availability area for comparison. The District of Columbia, the political subdivision having the greatest

impact on the SMSA percentages, is just not an area from which the defendants can be expected to draw any significant number of their employees. The distances involved, the lack of convenient available public transportation and the fact that salaries paid by the County and the other defendant agencies are lower than those paid by District of Columbia employers, most notably the federal government, are factors which dictate this conclusion. The distance and transportation factors also prohibit the Maryland subdivisions from being considered noteworthy sources of employment.

Nor is the Court persuaded that the SMSA is appropriate because the County has in the past used it in developing its hiring goals. The evidence is convincing that the SMSA reluctantly was used because at the time no more accurate standard was known.

Applicant Flow

The plaintiff also asserts that a statistical prima facie case may be made by a determination of the success rates of actual applicants for jobs or job categories; that is, by a comparison of the number hired with the number who applied to be hired, on the theory that the labor pool from which the defendants can be expected to draw employees is best evidenced by those persons actually applying for the jobs. And the Court agrees that this is an acceptable method, although it has certain drawbacks. First, it does not take into account whether an applicant is qualified. Second, it is subject to manipulation by both employer and employee, althought there is no evidence of any manipulation in

this case. Third, if a particular employer has a reputation for discrimination, this could reduce the number of minority or female applicants. Fourth, it does not take into account applicant training and preference. Fifth, it can penalize an employer who has an aggressive affirmative action program which results in a large number of minority or female applicants, some of whom are found not to be qualified. If is particularly this fifth deficiency which the Court feels disqualifies the applicant flow method here since, as hereafter more particularly set out, the County did have an aggressive affirmative action program in 1978.

Unfortunately, applicant flow data is only available for the year 1978 and thereafter.[4/] The plaintiff has sought to overcome this deficiency by applying the data for 1978 to an aggregation of

---

[4/] *Defendants' exhibits reveal that in 1978 the County's applicant flow by EEO-4 category was the following: for Officials and Administrators, the black applicant flow was 12.58% and the female applicant flow was 34.32%; for Professionals, the black applicant flow was 11.26% and the female applicant flow was 55.35%; for Technicians, the black applicant flow was 12.99% and the female applicant flow was 44.85%; for Protective Service workers, the black applicant flow was 22.96% and the female applicant flow was 12.32%; for Para-Professionals, the black applicant flow was 9.78% and the female applicant flow was 54.63%; for Clericals, the black applicant flow was 12.60% and the female applicant flow was 86.21%; for Skilled Craft workers, the black applicant flow was 13.52% and the female applicant flow was 6.89%; and for Service and Maintenance workers, the black applicant flow was 19.57% and the female applicant flow was 10.54% (DX 48, 49).*

employee appointments for the years 1974 through 1978 (PX 119 and 123). By this method, using the formula adopted in Castaneda v. Partida, 430 U.S. 482 (1977), and Hazelwood School District v. United States, 433, U.S. 299 (1977) where the number of employees involved was sufficiently large, and using the exact binomial distribution where the numbers involved were small, standard deviation disparities well above tolerable levels were derived (except in the case of category 1 where the number of appointments was so small that any deviation was not statistically significant) which clearly exceeded tolerable standards.

The aggregation of the years 1974-1978 for appointments, but the use of only one year's applicant flow data for comparison purposes, is in the Court's view an improper method of ascertaining disparity. The Court recognizes that the absence of the applicant flow data for prior years is to some extent the defendants' fault. Supra, p. 3. But there is good reason to believe that the year 1978 was not a typical year for applicant flow data. While there is some conflict on this point between the deposition testimony of Dale Friesz, former County Director of Personnel, presented by the government on the one hand, and the testimony of Cornelius O'Kane, present Acting Director of Personnel on the other hand, the Court is convinced that an aggressive (and successful) affirmative action program on the part of the County,[2/]

[2/] *The County adopted the program in October, 1977 to become effective beginning January 1, 1978.*

resulted in many more minority and female applicants for employment during 1978 than in prior years. A comparison of the successful applicants during prior years with the number of applicants in 1978 to obtain success rates for those prior years distorts the true picture of the disparity, and penalizes the County for its otherwise commendable efforts.[1/]

Accordingly the Court concludes that the applicant flow data put forth by the plaintiff does not justify a finding that a prima facie case has been made out.

Specific Instances of Discrimination

The plaintiff, in addition to its statistical presentation, has produced certain evidence tending to show discrimination on account of race and sex in specific instances. In none of the alleged sex discrimination instances except those of Sutphin (denial of opportunity to transfer from a clerical to a technical position in the Department of Environmental Management), Dyer and Clark (denial in 1977, as employees of Sheriff's Office, to work as desk

---

[1/] *This distortion is precipitated by the fact that in 1978 in all probability more blacks and females applied for jobs in Fairfax County than had applied in past years as a result of the affirmative action plan; if the number of blacks and females hired in 1978 remained roughly constant, the disparity between the number seeking employment and those hired in 1978 would be greater than in past years. That disparity in 1978 should not be used to reconstruct applicant flow data in past years in which the number of applicants might well have been fewer than in 1978 and productive of a lower disparity between numbers applying and those hired.*

technicians and road deputies or in court security) does the Court find discrimination; and these instances are insufficient from which to infer a pattern and practice of discrimination on account of sex.

Except in the case of former police officer Stokes (a case in which the Court finds he was clearly discriminated against prior to his resignation in 1973 in his requests to be assigned as a detective, his seeking of a promotion to corporal and his use of a police cruiser, as well as in his experience in being rehired in 1975), the Court finds no discrimination on account of race sufficient to draw an inference of a pattern or practice by the County.

These specific instances, even as a supplement to the plaintiff's statistics, show only isolated or sporadic acts, not the "standard operating procedure" necessary in a pattern or practice action. International Brotherhood of Teamsters v. United States, 431 U.S. 324, 336 (1977).

While the conclusion by the Court that no prima facie case has been made out by the government would ordinarily end the matter, the defendants of course did not know at trial that this conclusion was the one the Court would reach. They accordingly put on evidence to rebut any prima facie case.

To this end the defendants have developed another method to determine the labor pool from which they can be expected to draw their employees.

The defendants ascertained the geographic distribution of

persons who applied for employment in 1978 by use of their zip codes. This revealed the following:

Residence of Applicants	Approximate Percentages
Northern Virginia	78.02%
District of Columbia	5.60%
Suburban Maryland	7.04%
Middle Atlantic	4.56%
New York/Penn./Del.	2.58%
Remainder of U.S.	2.21%

This was further broken down into the percentages in each area for each of the eight categories (DX 1).[2/] All of these reveal that by far the greater percentage of applicants lived in Northern Virginia. Then, by resort to 1970 census data, the approximate availability of qualified females, blacks and other minorities in the eight categories at issue for those geographic areas listed above was determined. A weighted comparison was then made to obtain a model reflective of the demographic composition of the labor pool from which the defendants could be expected to draw their employees.

This method also has its drawbacks, as counsel for the defendants concedes. For example, it uses 1970 census data and there may be more recent data available; it appears that some of the zip codes used included areas of Fauquier and Rappahannock Counties; and the government argues that 1970 data reflects existing discrimination (although there is no direct evidence of that).

[2/] *The Court adopts the defendants' proposed findings of fact Nos. 16 through 23, attached as Appendix C, from which DX 1 is derived.*

Moreover, the use of a 1978 labor pool for comparison with hires in earlier years suffers from some of the same deficiencies as the plaintiff's use of 1978 applicant flow data for earlier year comparisons. Yet the areas from which applicants originate would not seem to vary as much as the applicant flow, nor would the former be affected as much by 1978 affirmative action efforts as the latter. The Court concludes that this method is certainly the best of the three methods presented to ascertain the available labor pool. It accordingly adopts the defendants' proposed findings of fact 27 as the most accurate, although admittedly not exact, available labor pool for comparison purposes. That pool is as follows:

EEO-4 Job Category	% Blacks in Revelant Labor Market	% Females in Revelant Labor Market
Officials and Administrators	4.8%	$19.9%
Professionals	6.5%	35.6%
Technicians	3.8%	34.4%
Protective Service Workers	14.6%	6.9%
Para-professionals	2.6%	33.9%
Office and Clerical Workers	4.2%	77.4%
Skilled Craft Workers	8.3%	6.4%
Service and Maintenance Workers	18.6%	42.3%

(See DX 70.)

A statistical analysis based on the foregoing shows, for the years 1974, 1975, 1976, 1977 and 1978, that in all instances except four, any deviation of the observed number of blacks hired is accounted for by chance, i.e., within tolerable deviations. These four instances are EEO-4 job category 4 (Protective Service Workers) in calendar years 1976 and 1977, and EEO-4 job category 8 (Service and Maintenance Workers) in the calendar

years 1976 and 1977.

A similar statistical analysis for females for the same years shows that in all instances except five, any deviation of the observed number of females hired less than expected number of females hired is accounted for by chance, i.e., within tolerable deviations. These five instances are EEO-4 job category 8 (Service and Maintenance Workers) for calendar years 1974, 1975, 1976, 1977 and 1978.

Thus, while the plaintiff's evidence is insufficent to show any disparity in hiring, the defendants' evidence, for the enumerated instances only, does. Having the defendants' evidence before it as part of the overall submission of evidence, the Court cannot ignore the adverse impacts revealed by that evidence. Accordingly, the Court will determine whether there has been shown any justification for the disparity in the nine (9) instances where that has been shown to exist.

Insofar as blacks are concerned, the disparity is for the years 1976 and 1977 in job category 4 (Protective Service) and job category 8 (Service and Maintenance). For those years the Court finds inadequate the attempts by the County to rebut the case made out (by the defendants' own evidence)[10/] of purposeful dis-

---

[10/] *The Court does not feel that the statistical evidence of the plaintiff as to the disportionate number of blacks assigned to certain job classifications within the EEO-4 categories is sufficient, standing alone, to warrant an inference of purposeful discrimination. That evidence however, when coupled with the defendants' evidence gives additional support to a finding of discrimination for the years 1976 and 1977 in the two designated job categories.*

crimination. True, the only case made out is a statistical one since the other evidence of individual discrimination has not itself been shown to be more than isolated acts. Statistics may be rebutted, but here they have not been - at least not for those years. While there has been an attempt to validate the tests given those in the protective service, the attempt can be characterized as no more than an excellent first step, and the Court is persuaded by the plaintiff's evidence that these tests have not yet been validated.

Insofar as females are concerned, the disparity is for the years 1974, 1975, 1976, 1977 and 1978 in job category eight. The County has made no convincing showing of justification for this disparity; and the Court finds unrebutted the case of purposeful discrimination on account of sex made out in this job category. The testimony that females do not prefer the jobs in this category is just not sufficient.

Remedy

In addition to the obvious need for an injunction proscribing discrimination on account of sex in job category 8, the question remains as to what additional relief should be granted. The testimony of O'Kane, the present Acting Director of Personnel for the County, outlining the vigorous and

successful affirmative action efforts[11] on the part of the County, is impressive and persuasive. The fact that these efforts are implementations of a plan, effective January 1, 1978, but adopted in October of 1977 before the County was aware of the government's investigation, makes them even more credible. The efforts, beginning in 1978 with the fire fighting position of the Protective Service, although shouldered and initiated in large part by the national union, are particularly outstanding insofar as minorities are concerned. Despite its record in 1976 and 1977, the County has made convincing and satisfactory progress toward the goal of equal employment opportunity for blacks in both job categories, and, as importantly, evinces a commitment to continue to do so. Under these circumstances, no "compelling need" has been shown for the ordering of the percentage employment goals for blacks as requested by the plaintiff. Sledge v. J.P. Stevens & Co., Inc., 484 F. 2d 625 (4th Cir. 1978); nor, indeed,

---

[11] *These efforts include, among others: the setting of specific goals, some of which have been met (30% in excess of the County's goal for new minority hires in the Professional category, 73% in excess of the goal in Protective Service and 75% excess in Service Maintenance); the public advertisement of job openings especially in minority periodicals and in minority institutions (DX 5); a requirement that when certified names are forwarded to an agency with a vacancy, 40% of the names will be minorities if that many have been certified; a requirement that all certified names must be interviewed and reasons given for rejections; the institution of a job sharing program, mainly for women; the institution of a job re-entry program designed for persons who have been out of the employment market for any length of time; and the institution of a minority intern program. See also DX 22.*

has any need been shown for a general injunction proscribing discrimination on account of race.

The situation with regard to females in job category 8 is slightly different. While the County's affirmative action efforts are sufficient to preclude any finding of a "compelling need" so as to warrant an imposition of percentage hiring goals, nevertheless the disparity has unjustifiably persisted through 1978 despite these efforts. A general injunctive decree will, in the Court's view, afford effective relief; and the Court will grant it. Jurisdiction will be retained to allow the Court to monitor future progress of the County insofar as employment of females in category 8 is concerned.

Absent a finding of a pattern and practice of discrimination in a particular job category, no specific relief will be awarded individuals in that category. No instance of specific discrimination has, of course, been found, either in category 8 for females or in category 4 or 8 for blacks during the years 1976 and 1977.

/s/ Albert V. Bryan, Jr.

United States District Judge

Alexandria, Virginia
April 20th, 1979

APPENDIX A

97. Defendants have received funds from the Law Enforcement Assistance Administration (LEAA) pursuant to the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. §3766 et seq. in each year from 1968 to 1979 and have funded County programs in part with such funds (Plaintiff's Exhibit 51; Defendants' Exhibit 67).

Defendants have received funds from the United States Department of the Treasury, Office of Revenue Sharing, pursuant to the State and Local Fiscal Assistance Act of 1972, as amended, 31 U.S.C. §1221 et seq. in each year from 1973 to 1979 and have funded County programs in part with such funds (Plaintiff's Exhibit 50; Defendants' Exhibit 68, 69).

99. Under the Equal Employment Opportunity Commission Guidelines on Employee Selection Procedures, effective from August 1, 1970 to August 25, 1978, employers were required by §1607.4 to have available for inspection evidence showing the rejection rates on tests for minority and non-minority applicants and, where technically feasible, to validate any tests having differential rejection rates (Plaintiff's Exhibit 38 at p. 28).

100. The Equal Employment Opportunity Commission's Regulations, at 29 C.F.R. §1602.31, have required, since at least 1974, that any personnel or employment record made by a political jurisdiction, including application forms submitted by applicants and other records related to hiring, promotion, demotion, transfers, layoff, or termination, be preserved for a period of two years from the date the record was made or the personnel action occurs, and further require that where a charge or

action is brought by the Attorney General against a political jurisdiction under Title VII, all personnel records relevant to the charge or action shall be preserved until its final deposition (Plaintiff's Exhibit 36 a, b, c, and d at pp. 6-7; 29 C.F.R. §1602.31).

101. The Department of the Treasury, Office of Revenue Sharing, issued amended regulations in November of 1975, which prohibit at §51.53(b) the use by any recipient of revenue sharing funds of employee selection procedures that disqualify a disproportionate number of minorities or women for employment and that are not related to job performance; further, section 51.53(c) requires recipients to conduct continued self- evaluation to ascertain if their selection devices are having an adverse effect on minorities or women (Plaintiff's Exhibit 36 at p. 14).

102. The Federal Executive Agency Guidelines on Employee Selection Procedures adopted by the Department of Justice on November 23, 1976, require at §4 that employers have available for inspection records disclosing the impact of their selection procedures on the employment opportunities of persons by racial, ethnic or sex group; that the data be examined for possible adverse impact; and, if adverse impact is indicated, that individual components of the selection process be evaluated for adverse impact (Plaintiff's Exhibit 37 at p. 51736).

103. The Department of Justice Law Enforcement Assistance Administration (LEAA) issued regulations on February 16, 1977, which, at §42.203(b)(9), incorporate by reference the

requirements of the Department of Justice Guidelines on Employee Selection Procedures (Federal Executive Agency Guidelines), requiring an employer to maintain records disclosing the impact of its selection procedures on persons of different racial, ethnic or sex groups (Plaintiff's Exhibit 50 at p. 295).

104. The Equal Employment Opportunity Commission and the Department of Justice, inter alia, adopted Uniform Guidelines on Employee Selection Procedures effective September 25, 1978 which require, at §15, an employer to maintain and have available information on the adverse impact of the selection process for each of its jobs, and, when the total selection process has adverse impact, require the employer to maintain information showing which components of the selection process have adverse impact (43 F.R. 38290, August 25, 1978).

105. Prior to January 1, 1978, Fairfax County application forms and the portion of the forms indicating the race and sex of applicants, were routinely discarded without being analyzed (Friesz Deposition, Plaintiff's Exhibit 53, Vol. II, 2/6/79, at 67-71).

106. Prior to January 1, 1978, the defendants maintained no data from which the pass/fail rates of blacks, whites and women could be reconstructed for entry level selection devices used to screen applicants for employment (Friesz Deposition, Plaintiff's Exhibit 52, 1/15/79 at 137-39).

107. Until March 2, 1979 (in response to Plaintiff's interroga-

tories), the defendants had no data available which analyzed the pass/fail rates of blacks, whites or women on written examinations, and did not provide pass/fail rates on other of their selection devices for positions in their workforce to plaintiff (Friesz Deposition, Plaintiff's Exhibit 52, 1/15/79 at 137-39; 143-44; 1/16/79 at 204-205; Plaintiff's Exhibit 53, Vol. III, 2/8/78 at 31; Plaintiff's Exhibit 22).

108. The Law Enforcement Assistance Administration issued regulations effective August 18, 1972 and again on February 16, 1977 which, at 28 C.F.R. §42.207 in 1972 and §42.207 in 1977 incorporate the requirement of §42.106 that fund recipients permit Justice Department officials access to any records pertinent to ascertaining compliance with the anti-discrimination provisions of the Omnibus Crime Control and Safe Streets Act of 1968, as amended & Plaintiff's Exhibit 39 and 40).

109. EEOC Form 164, State and Local Government (EEO-4) Instruction Booklet, for 1974, 1975, 1976 and 1977 states that employers must keep records and statistics necessary to complete an EEO-4 report for three years and that the data underlying these reports should be available on request to representatives of Federal agencies (Plaintiff's Exhibit 36a, b, c, and d at 1.)

110. The Department of Treasury, Office of Revenue Sharing, issued amended regulations in November of 1975, which require at §51.56 that recipients of Revenue Sharing funds permit representatives of the Department of Justice access to any information relevant to determining whether the recipient is in com-

pliance with the discrimination prohibitions of the State and Local Fiscal Assistance Act of 1972, as amended (Plaintiff's Exhibit 38 at p. 16).

111. Section 4 of the Federal Executive Agency Guidelines on Employee Selection Procedures adopted by the Department of Justice on November 23, 1976, requires that employers have available for inspection by the implementing federal agencies information disclosing the impact of its selection procedures on persons in different race, sex or ethnic groups (Plaintiff's Exhibit 37 at p. 51736).

112. Section 4 of the Uniform Guidelines on Employee Selection Procedures (1978), adopted by, inter alia, the Equal Employment Opportunity Commission and the Department of Justice on August 25, 1978, requires that employers have available for inspection by the implementing federal agencies records disclosing the effect of their selection devices on persons in different race, sex or ethnic groups. 43 Fed. Reg. 38297 (Friday, August 25, 1978).

113. In a letter dated November 16, 1977 from James S. Angus, an attorney with the Department of Justice, to Lee Ruck, County Attorney for Fairfax County, the Justice Department requested computer tapes containing race/sex information, job class, salary, department and starting position of all county employees; applicant flow data by year and race and sex for the past 5 years; hiring data by job class, race and sex for the past 5 years; pass/fail statistics for all County screening devices, copies

of validation studies, and other information on the organization and structure of the County government (Plaintiff's Exhibit 41).

114. By February 7, 1978, the County had not yet provided any of the information requested by Justice Department representatives (Plaintiff's Exhibit 42).

115. By March 7, 1978, the County had not yet provided any substantive information to the Justice Department (Plaintiff's Exhibit 43).

116. On March 13, 1978, F. Lee Ruck wrote James S. Angus asserting that the Attorney General had no authority to conduct an investigation of the County's employment practices (Plaintiff's Exhibit 44).

117. On March 31, 1978, The Department of Justice set out the minimum information it was requesting and which was necessary to make an appraisal of the County's employment status (Plaintiff's Exhibit 45).

118. On April 12, 1978, the Justice Department was informed that the Fairfax County Board of Supervisors had declined to provide information concerning the race and sex composition of Police and Fire Department applicants and hires from 1975-1977, test impact data for police and fire positions, race and sex composition of annual County hires from 1975 to 1978 in EEO-4 categories, and the job qualifications and race and sex composition of current employees and annual hires in the County's fifty most populous job classifications (Plaintiff's Exhibit 47).

119. On April 13, 1978, Fairfax County by letter informed the Department of Justice that it would not provide certain information requested by the United States because the County deemed it not essential to the United States' investigation (Plaintiff's Exhibit 46).

120. The submission of information from Fairfax County to the Department of Justice did not include requested information on fire and police applicants for 1975 and 1976, fire and police hires for 1975-1977, test impact data for the fire and police departments, annual hires by EEO-4 category for 1975-1977, and annual hires for the fifty most populous job classifications for 1975-1977 (Plaintiff Exhibit 48).

APPENDIX B

	Total Employees
Board of Supervisors	11
Office of the County Executive	24
Office of Assessments	193
Consumer Affairs	23
Finance	78
General Services	3
Facilities Management	143
Communications	73
Equipment Management	209
Personnel	37
Purchase and Supply	43
Public Affairs	9
County Attorney	28
Computer Center	54
Research and Statistics	72
Management and Budget	28
Project Management	5
Project Engineering	39
Waste Management	27
Line Maintenance	155
Public Works Office	4
Capital Facilities	12
Wastewater Treatment	257
Utilities Planning	36

	Total Employees
Maintenance and Construction	135
Environmental Management	21
Design Review	152
Inspection Services	147
Zoning Enforcement	2
Mapping Division	1
Comprehensive Planning	85
Human Rights	4
Transportation	10
Property Management	8
Solid Waste	165
Recreation	68
Park Authority	318
Alcohol Safety	19
Office for Children	2
Alcoholism Treatment	11
Drug Abuse Control	8
Northwest Mental Health	63
Community Services Board	21
Fairfax House	14
Woodburn Mental Health	54
Mt. Vernon Health	100
Police	1039
Office of Sheriff and Jail	142
Fire and Rescue	800
Animal Control	44
Total	4996

APPENDIX C

16. The geographic distribution of persons filing applications in 1978 with Fairfax County for positions in EEO-4 job category 1, "OFFICIALS AND ADMINISTRATORS," is as follows:

Residence of Applicants	Approximate Percentage
Northern Virginia	62.71%
District of Columbia	7.97%
Suburban Maryland	12.63%
Middle Atlantic	7.97%
New York/Penn./Del.	3.46%
Remainder of U.S.	5.26%

(Exh. 2, 24, 46, 50, 59, 70; Lanigan, Baldino, Noe, Howard Bloch).

17. The geographic distribution of persons filing applications in 1978 with Fairfax County for positions in EEO-4 job category 2, "PROFESSIONALS," is as follows:

Residence of Applicants	Approximate Percentage
Northern Virginia	66.90%
District of Columbia	8.65%
Suburban Maryland	11.81%
Middle Atlantic	5.90%
New York/Penn./Del.	2.74%
Remainder of U.S.	4.01%

(Exh. 2, 24, 46, 50, 59, 70; Lanigan, Baldino, Noe, Howard Bloch).

18. The geographic distribution of persons filing applications in 1978 with Fairfax County for positions in EEO-4 job category 3, "TECHNICIANS," is as follows:

Residence of Applicants	Approximate Percentage
Northern Virginia	83.34%
District of Columbia	3.16%
Suburban Maryland	6.48%
Middle Atlantic	4.40%
New York/Penn./Del.	1.43%
Remainder of U.S.	1.19%

(Exh. 2, 24, 46, 50, 59, 70; Lanigan, Baldino, Noe, Howard Bloch).

19. The geographic distribution of persons filing applications in 1978 with Fairfax County for positions in EEO-4 job category 4, "PROTECTIVE SERVICE WORKERS," is as follows:

Residence of Applicants	Approximate Percentage
Northern Virginia	57.58%
District of Columbia	12.26%
Suburban Maryland	9.58%
Middle Atlantic	5.76%
New York/Penn./Del.	11.80%
Remainder of U.S.	3.02%

(Exh. 2, 24, 46, 50, 59, 70; Lanigan, Baldino, Noe, Howard Bloch).

20. The geographic distribution of persons filing applications

in 1978 with Fairfax County for positions in EEO-4 job category 5, "PARA—PROFESSIONALS," is as follows:

Residence of Applicants	Approximate Percentage
Northern Virginia	92.34%
District of Columbia	1.28%
Suburban Maryland	2.04%
Middle Atlantic	2.81%
New York/Penn./Del.	1.02%
Remainder of U.S.	0.51%

(Exh. 2, 24, 46, 50, 59, 70; Lanigan, Baldino, Noe, Howard Bloch).

21. The geographic distribution of persons filing applications in 1978 with Fairfax County for positions in EEO-4 job category 6, "OFFICE AND CLERICAL WORKERS," is as follows:

Residence of Applicants	Approximate Percentage
Northern Virginia	96.21%
District of Columbia	0.97%
Suburban Maryland	0.97%
Middle Atlantic	1.64%
New York/Penn./Del.	0.12%
Remainder of U.S.	0.09%

(Exh. 2, 24, 46, 59, 70; Lanigan, Baldino, Noe, Howard Bloch).

22. The geographic distribution of persons filing applications in 1978 with Fairfax County for positions in EEO-4 job category 7, "SKILLED CRAFT WORKERS," is as follows:

Residence of Applicants	Approximate Percentage
Northern Virginia	92.86%
District of Columbia	1.72%
Suburban Maryland	1.20%
Middle Atlantic	3.87%
New York/Penn./Del.	0.17%
Remainder of U.S.	0.17%

(Exh. 2, 24, 46, 50, 59, 70; Lanigan, Baldino, Noe, Howard Bloch).

23. The geographic distribution of persons filing applictions in 1978 with Fairfax County for positions in EEO-4 job category 8, "SERVICE AND MAINTENANCE WORKERS," is as follows:

Residence of Applicants	Approximate Percentage
Northern Virginia	93.24%
District of Columbia	1.65%
Suburban Maryland	1.10%
Middle Atlantic	3.77%
New York/Penn./Del.	0.08%
Remainder of U.S.	0.16%

(Exh. 2, 24, 46, 50, 59, 70; Lanigan, Baldino, Noe, Howard Bloch).

24. Approximately 78.02% of all persons filing job applications with the County in 1978 resided in Northern Virginia at the time of application. A substantial majority of all applicants for each EEO-4 job category resided in Northern Virginia; in each such category there were sufficient applications to make.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 79-1599

United States of America,

Appellant,

v.

County of Fairfax, Virginia;
Members of the Board of County
Supervisors, John F. Herrity,
Warren I. Cikins, Alan H. Magazine,
Audrey Moore, Martha Pennino, James
S. Scott, John P. Shacochis, Marie B.
Travesky, Joseph Alexander;
Office of Sheriff and Jail; James
D. Swinson, Sheriff, County of
Fairfax; Fairfax-Falls Church
Community Services Board; Gene
Moore, Chairman of the Fairfax-Falls
Church Services Board; Jack M. Watson,
Executive Director of Fairfax-Falls
Church Services Board; The Fairfax

County Park Authority; Estelle R. Holley, Chairman of the Board of Fairfax County Park Authority; Joseph P. Downs, Director of the Fairfax County Park Authority; J. Hamilton Lambert, Acting County Executive of the County of Fairfax,

Appellees.

No. 79-1600

United States of America,

Appellee,

v.

County of Fairfax, Virginia; The Office of Sheriff, Fairfax County; The Fairfax-Falls Church Community Services Board; The Fairfax County Park Authority,

Appellants.

and

Members of the Board of
County Supervisors, John F.
Herrity, Warren U. Cikins, Alan
H. Magazine, Audrey Moore, Martha
Pennino, James S. Scott, John P.
Shacochis, Marie B. Travesky,
Joseph Alexander; James D.
Swinson, Sheriff, County of
Fairfax; Gene Moore, Chairman
of the Fairfax-Falls Church
Services Board; Jack M. Watson,
Executive Director of Fairfax-
Falls Church Services Board;
Estelle R. Holley, Chairman
of the Board of Fairfax County
Park Authority; Joseph P. Downs,
Director of the Fairfax County Park
Authority; J. Hamilton Lambert,
Acting County Executive of the County.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge.

Argued May 5, 1980 Decided July 23, 1980

Before WINTER, MURNAGHAN, and SPROUSE, Circuit Judges.

David L. Rose (Justine W. Williams, United States Attorney; Drew S. Days, III, Assistant Attorney General; Jessica Dunsay Silver, Dennis J. Dimsey, Joan F. Hartman, Dept. of Justice on brief) for Appellant; Jack L. Gould, Assistant County Attorney (David T. Stitt, Acting County Attorney on brief) for Appellees; (Robert E. Williams, Douglas S. McDowell, Lorence L. Kessler, McGuiness & Williams on brief) as Amicus Curiae the Equal Employment Advisory Council.

WINTER, Circuit Judge:

The United States sued Fairfax County, Virginia, and certain governmental officials and agencies within the County[1] for alleged violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. § 1242 (Revenue Sharing Act), and the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3766 (Crime Control Act).[2]

---

[1] *Collectively, defendants will be sometimes referred to as the "County."*

[2] *Because Title VII standards also govern discrimination claims raised under the Revenue Sharing Act and the Crime Control Act, this opinion will discuss only Title VII. See United States v. New York, 82 F.R.D. 2, 4-5 (N.D. N.Y. 1978); United States v. Baltimore County, 17 EPD §8509 (D. Md. 1978).*

It alleged and produced evidence at trial that the County pursued a pattern and practice of employment discrimination against blacks and women in recruitment, hiring, assignments, and promotions. It also alleged and produced evidence at trial that the County used unvalidated testing devices with a disparate impact on blacks and women, that blacks and women were employed disproportionately in lower-paying and less desirable positions and that the County had refused to supply the Department of Justice with data necessary to a determination of whether the County was in compliance with the non-discrimination provisions of the Revenue Sharing Act, the Crime Control Act, and the regulations promulgated thereunder.[2/]

After trial, the district court entered judgment largely for the County. Inexplicably, it failed to discuss and apparently failed to consider the government's disparate impact case. With respect to the government's disparate treatment case, it found that the County had discriminated against blacks in only two job categories and that it had discriminated against women in only one job category. Because of the County's affirmative action program, the district court found it unnecessary to grant relief for the racial discrimination that it found, but it granted an injunction against the sex discrimination in the one job category.

[2/] *31 C.F.R. § 4, Department of Justice Employee Selection Guidelines; 28 C.F.R. § 42.106.*

Because of the County's affirmative action program, the district court found it unnecessary to grant relief for the racial discrimination that it found, but it granted an injunction against the sex discrimination in the one job category. Finally, the district court declined to order the County to comply with record keeping regulations because it thought that the County would comply voluntarily. Both the government and the defendants appeal. In most part, we vacate the judgment and remand the case for further proceedings.

As our introductory paragraphs indicate, this is both a disparate treatment and a disparate impact case. See Teamsters v. United States, 431 U.S. 324, 335 (1977). This will necessitate separate discussion of the applicable law and separate discussion of some of the facts. Pertinent to both aspects of the case are the following facts:

A. General

The County has a work force of nearly 5,000 employees, divided into fifty departments which can be grouped into eight categories: (1) officials and administrators, (2) professionals, (3) technicians, (4) protective service workers, (5) para-professionals, (6) office and clerical workers, (7) skilled craft workers, and (8) service and maintenance workers. Within these categories, the County had 397 job classifications in which there were no or virtually no blacks or women; but, taking the categories as a whole,

the County had in the year 1978 the following employees classified by race and sex:

Category	Total	White	Black	Male	Female
1 Officials	149	142 (95.3%)	4 (2.7%)	129 (86.6%)	20 (13.4%)
2. Prof.	782	735 (94.0%)	25 (3.2%)	598 (76.5%)	184 (23.5%)
3. Tech.	536	498 (92.9%)	24 (4.5%)	442 (82.5%)	94 (17.5%)
4. Prot. Serv.	1446	1350 (93.4%)	79 (5.5%)	1264 (87.4%)	182 (12.6%)
5. Para-prof.	51	49 (96.1%)	2 (3.9%)	35 (68.6%)	16 (31.4%)
6. Clerical	858	785 (91.5%)	45 (5.2%)	68 (7.9%)	790 (92.1%)
7. Sk. Craft	575	526 (91.5%)	30 (5.2%)	566 (98.4%)	9 (1.6%)
8. Serv. & Maint.	599	427 (71.3%)	167 (27.9%)	577 (96.3%)	22 (3.7%)
Totals	4996	4512 (90.3%)	376 (7.5%)	3679 (73.6%)	1317 (26.4%)

B. Disparate Treatment Case

The United States produced two sets of statistical data to demonstrate that the percentages of blacks and women in the County's work force were significantly disproportionate to the percentages of blacks and women in the available labor market. Thereby, the United States sought to prove a prima facie case of disparate treatment of blacks and women. Proof of a prima facie case would, of course, cast the burden on the County to rebut the inference that it had practiced purposeful racial and sexual discrimination.

First, the United States offered statistical data for the Washington, D.C. Standard Metropolitan Statistical Area (SMSA) based on the 1970 census and a 1974 Department of Labor Report. Significant disparities were proved. Defendants' work force in 1978 was 7.5% black while the SMSA pool, measured by the 1970 census, was 24% black. As well, defendants' work force was 26.4% female while the SMSA labor pool was 40.4% female.

Second, the government presented data showing the race and sex of persons who had applied for employment with the County (the "applicant flow data"). This evidence was followed by expert testimony that statistically significant disparities existed in a wide range of job categories between the percentages of blacks and women in the 1978 applicant pool and the percentages of blacks and women hired by the County from 1974 through 1978.[4/] Specifically, the expert found disparities with respect to blacks in six of the eight job categories and with respect to women in five of the eight categories.

The United States attempted to prove disparate treatment of blacks and women through two other methods. The government showed that blacks and women were clustered in the lower-paying and less desirable job classifications. The service and maintenance category accounted for 44.41% of 1978 black incumbent employees, but only 9.45% of white incumbents. Of blacks hired from 1974 through 1978, 31.7% were assigned to the job classifications of public service workers or custodian in contrast to 4.9% of whites. Over 59% of defendants' female employees in 1978 were employed in the office and clerical worker category, but only 1.85% of male employees were similarly assigned.

[4/] *In violation of the record keeping regulations of the Revenue Sharing Act and the Crime Control Act, defendants had destroyed pre-1978 applications for employment. As a consequence, the government's expert, assuming that the rate remained constant, used the 1978 rate of applications from blacks and women and applied it to previous years.*

Additionally, the government presented evidence of isolated instances of actual race and sex discrimination in the police department, the Department of Environmental Management, and the Sheriff's Office.

The County's defense to the government's disparate treatment case consisted of its own statistical analysis and proof of its 1978 affirmative action plan. It prepared an analysis of the zip codes of 1978 applicants and determined the percentage of applicants from six geographical areas: Northern Virginia, the District of Columbia, suburban Maryland, the Middle Atlantic States, New York-Pennsylvania-Delaware, and the remainder of the United States. Figures from the 1970 census were used to determine the number of employed and experienced unemployed persons by race and sex from each of the six geographic regions, and based on these figures the County derived composite "availability" statistics for blacks and women in each of the job categories for these geographic areas. The evidence of actual hires in 1974-78 when compared to the composite available labor market showed significant disparities with respect to blacks for 1976 and 1977 in the protective service workers category and the service and maintenance workers category and with respect to females for 1974-78 in the service and maintenance workers category.

The County also presented evidence concerning its 1978 affirmative action plan. It introduced the plan and developed through testimony its efforts to increase the mailing list from 250 to 300

organizations, its "balanced certification" plan to certify minority applicants meeting minimum qualifications for interviews by the hiring agency, its policy of counting volunteer experience as part of an applicant's qualifications; and its hiring goals. Because it had destroyed pre-1978 applications, the County was unable to offer any evidence of the effectiveness of its 1978 affirmative action plan as compared to its pre-1978 recruitment efforts.

In deciding the government's disparate treatment case, the district court rejected both the government's SMSA data and its applicant flow data as measures of the County's labor pool. The district court decided that the government's SMSA statistics were not controlling because of the physical and economic distance between the County and the District of Columbia. The district court also found fatal flaws in the government's applicant flow data, based upon the district court's conclusion that the County's affirmative action plan increased the percentages of women and black applicants in 1978. In addition, the district court declined to draw any inference of discrimination from the disproportionate number of females in the clerical category and the disproportionate number of blacks in the service and maintenance category. It concluded that "it is as reasonable to infer that these statistics are a result of preference as of discrimination."

The district court chose to judge the County's employment record against the County's zip code analysis of its labor market. Even though that analysis revealed that the County had hired

smaller percentages of blacks in two job categories[3/] than were present in the labor market, the district court concluded, based on the County's affirmative action program, that equitable relief was unnecessary to correct racial discrimination. Because of a finding of discrimination against women in one job category,[4/] however, the district court did enjoin future sex discrimination.

C. Disparate Impact Case

In its disparate impact case, the United States presented evidence establishing that the County had used six employment tests, which were prerequisites for job classifications constituting approximately one-third of the County's work force, that operated to exclude blacks from employment and promotion.

[3/] *The zip code analysis uncovered discrimination against blacks during 1976 and 1977 in the protective services and the service and maintenance categories.*

[4/] *Sex discrimination was found in the service and maintenance category for the years 1974-78.*

Its evidence is summarized in the following table:

	Whites Passing	Whites Failing	Blacks Passing	Blacks Failing	White Pass Rate	Black Pass Rate
Clerical (1978)	422	122	35	45	77.6%	43.8%
Clerical Specialist (1978)	153	13	4	4	92.2%	50.0%
Firefighter I (1978-1979)	264	61	85	50	81.2%	63.0%
Firefighter II (1978)	165	45	0	8	78.6%	0.0%
Police Officer (1974-1975)[2/]	300	24	525	425	92.6%	55.3%
Police Officer (1978-1979)	476	55	31	27	89.6%	53.4%
Police Corporal (1977)	184	162	1	13	53.2%	7.1%

Coupled with these statistics, the government offered the testimony of an expert that the disparity in pass rates of blacks and whites was statistically significant.

The County offered no evidence that any of these tests had been fully validated to establish their relationship to the skills needed in the particular jobs. It did offer evidence that validation studies were under way for the entry level tests for firefighters and policemen. It sought through the testimony of its own employees to show that the firefighter II test and the test for clerical and clerical specialists adequately examined skills necessary for tasks performed on the job. Additionally, the County showed that the police corporal tests had been validated in another state. Finally, the County relied on its evidence in the disparate treatment aspect of the case, together

---

2/ The figures for the 1974-1975 police officer examination are for Fairfax County, Arlington County, and the City of Alexandria. The same examination was given for each jurisdiction.

with a government exhibit which was not offered in evidence,[1] to prove that blacks were hired in proportions which indicated no disparate impact, contending that any disparate impact in the testing process was rectified by the lack of discrimination in the end result.

In entering its final decree, the district court did not discuss the disparate impact aspect of the case except to state that the validation studies for prospective service entry-level tests were no more than "an excellent first step", but that "the tests have not yet been validated."

A. The Disparate Treatment Case

The government undertook to prove its disparate treatment case largely through the use of statistical evidence showing a substantial racial and sexual imbalance in the County's work force. Proof of such an imbalance "is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired."

---

[1] *This exhibit contained statistics purporting to represent the number of black applicants. The statistics were furnished to the government by the county's personnel office. The government decided not to introduce the exhibit into evidence, allegedly because the statistics were unreliable.*

Teamsters v. United States, 431 U.S. at 340, n.20. Of course, proof of a discriminatory motive is a necessary element of a disparate treatment case, but statistics can establish a prima facie case, even without a showing of specific instances of overt discrimination. See, e.g., Hazelwood School District v. United States, 433 U.S. 299, 307-08 (1977); Barnett v. W. T. Grant Co., 518 F.2d 543, 549 (4 Cir. 1975).

The government's SMSA statistical evidence showed wide disparities between the relatively small percentages of blacks and women in the County's work force and the higher percentages of blacks and women in the County's labor market. As well, the government's applicant flow evidence demonstrated statistically significant disparities between the County's labor force and its applicant pool for blacks in six job categories and for women in five job categories. By contrast, the County's statistics showed significant disparities in the hiring of blacks in only two job categories and of women in only one job category. Thus, the degree of disparity between the percentages of blacks and women in the County's work force and in its labor market hinges on the choice of a relevant labor pool. The critical question for decision, then, is: Which is the relevant labor pool, the government's SMSA data, the government's applicant flow data, or the County's composite labor market derived from the study of zip codes?

It is to this question that we first direct our attention. While we think that the record supports the district court's rejection of the SMSA statistics, we do not think that government's applicant pool data should have been rejected. Concomitantly, we find the evidence of deficiencies in the County's zip code analysis sufficiently compelling so that we do not think that the use of this measure of the applicable labor pool should be sustained.

The greatest disparities between the hirings of women and blacks and the County's labor market appeared when the SMSA statistics were used as the relevant labor pool. The district court rejected the SMSA as a measure of the County's labor market, and although we recognize that there was conflicting evidence, we do not consider the district court's decision to be in error. As the government emphasizes, the County itself used the SMSA as the relevant labor market in three of its affirmative action plans and in a memorandum on minority police hiring. In addition, the County advertised job vacancies in metropolitan media, sent job announcements to organization throughout the SMSA, and imposed no residence requirement for any job except county executive. But there was evidence that the distance between the County and the District of Columbia, where there is a substantial black population which would raise the percentage of blacks in the SMSA statistics, was so great that without adequate mass transportation, which does not exist, the two labor markets are separate and distinct. Another factor contributing to the separation and inhibiting a flow of applicants from the District of Columbia is the fact that wage rates in the County are lower than in the District.

On balance, we perceive no error in the district court's rejection of the SMSA statistics.

The district court also rejected the government's second method of establishing the County's labor market, the applicant flow data. At the outset, we note that applicant data are normally highly relevant evidence of an employer's labor market. See Hazelwood School District v. United States, 433 U.S. at 308 n.13. Those who apply constitute the pool from which employees are selected.[2/]

In this case, the applicant data from which the government prepared its statistics were available only for the year 1978 because the County had destroyed all of the applications for 1974-77. As a consequence, the government extrapolated the figures for 1974-77 from the 1978 applicant pool by assuming that the applicant pool for 1974-77 contained the same proportions of blacks and women as did the 1978 applicant pool. The district court found two related defects in the government's extrapolated applicant flow data; we find, however, that neither of the supposed defects was serious enough to justify the district court's decision to reject the applicant flow data, here the most salient proof of the County's labor market.

[2/] Of course, if the victims of discrimination have been discouraged from applying, the applicant pool data may not adequately measure the percentages of women and blacks actually present in the labor market. See Dothard v. Rawlinson, 433 U.S. 321, 330 (1977). No such challenge has been made to the applicant pool data in this case.

First, the district court found the government's figures suspect because the court thought that the County's recent attempts at affirmative action probably resulted in larger percentages of women and black applicants in 1978 than in earlier years. We think that the district court's assumption is not substantiated by the evidence. The 1977-78 affirmative action plan was not the County's first; the County had had affirmative action programs since 1972. Some of the features of the County's 1977-78 program were basically continuations of past programs, such as publicity and mailings to minority organizations. Moreover, some other affirmative action efforts had been discontinued by 1978, and some of the new features of the 1977-78 program, e.g., giving credit for volunteer work, would have little effect on recruitment. On balance, then, we see no basis for concluding that the 1978 applicant figures were significantly different from those of prior years.

We are likewise not persuaded by the other reason assigned by the district court for rejecting the government's applicant flow data--that the 1978 data would penalize defendants because the County's affirmative action programs would more likely attract a larger number of unqualified applicants than had applied in earlier years. We cannot assume that blacks and women attracted by an affirmative action plan are more likely to be unqualified than white males who apply.

If such is the case, this possible defect in the statistics is a factual matter to be proved by defendants in rebuttal of the government's prima facie case; it is not a factor which determines if a prima facie case has been proved. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973). Neither of these two supposed flaws, then, justify the district court's decision to ignore the applicant flow data.

The district court's decision to reject the government's applicant flow data is the obverse of its decision that the County's zip code analysis provided the most reliable measure of the County's labor market. Unlike the district court, we perceive deficiencies in the County's zip code statistics which distort them sufficiently, in our view, that they cannot supplant the applicant flow data as the appropriate measure of the County's labor pool.

The County's zip code analysis suffered from two fundamental defects. First, the zip code percentages which the County derived from its applications were applied to 1970 census data. That data is suspect and probably an inaccurate reflection of actual conditions in 1974-78. The 1970 census data recorded only the numbers of blacks and women in particular job categories during a period when the effects of racial and sexual discrimination in employment were undoubtedly more severe than in subsequent years. See Smith v. Union Oil Co., 17 FEP Cases 960, 967, (N.D. Cal. 1977). Second, the County used only the population figures for the employed and the experienced unemployed blacks and women in the various job categories in 1970. Many of the County's employment opportunities, e.g., entry-level police and fire,

clerical, and maintenance jobs, surely require no prior experience, even if they do require an entrance examination. See Hazelwood School District v. United States, 433 U.S. at 308 n.13; Teamsters v. United States, 431 U.S. at 337 & n.17. Thus, the use of the County's figures undoubtedly understated the available labor market for these jobs by including only blacks and women who held or who had held similar positions.[19/]

In summary we think that, on the present record, the government's applicant flow data was the appropriate measure of the available labor market for the period 1974-78. When resort is had to the applicant flow data, it is obvious that the government proved a more extensive prima facie case than the district court recognized. We do not undertake to define the exact contours of the case, however. That is more properly the function of the district court. And, the district court must also weigh what evidence the County may adduce in rebuttal to explain significant statistical disparities in the employment of blacks and women and

---

[19/] *In addition, the County's study employed zip codes which included areas of distant Fauquier and Rappahannock Counties.*

It is significant also that, because of illness in his family, the preparer of the zip code analysis did not testify. His supervisor, who sponsored the exhibits, acknowledged numerous weaknesses in the data. The availability figures which were developed were given in terms of the categories of employment stated in the text, but they were derived from census figures which do not employ those categories. The supervisor could not explain or justify how the data was translated. Indeed, she could not identify the source for any data included in the exhibit.

to negative the inference of discriminatory intent.

While we express no view on the extend of the violation of Title VII which the district court may find on remand, we are constrained to comment on the limited relief the district court granted the victims it identified and its further refusal to grant a mandatory injunction to insure compliance with the record keeping requirements of law. In both respects, we think that the district court was in error.

To the extent that the district court finds racial discrimination, it is under a duty to render a decree which will both eliminate past discrimination and bar discrimination in the future. Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975). It is commendable that the County is continuing its affirmative action programs, although there was some evidence that the goals may soon be reduced. But, in any event, as we said in Barnette v. W. T. Grant Co., 518 F.2d at 550, "a court cannot abdicate to defendants' good faith its duty of insuring removal of all vestiges of discrimination."

Thus we think, that the district court should have granted injunctive relief against future discrimination. In granting injunctive relief, it should both have required compliance with the record keeping and disclosure requirements of existing law. See

EEOC v. Rogers Brothers, Inc., 470 F.2d 965 (5 Cir. 1972),[11] and imposed requirements for periodic reports to enable it to monitor compliance with its decree. Finally, if proof is offered of identifiable economic injury to blacks or women, or both, who have suffered from the County's discriminatory practices, it should grant back pay or retroactive seniority or both. Teamsters v. United States, 431 U.S. at 361-62; Albemarle Paper Co. v. Moody, 422 U.S. at 421; Hill v. Western Electric Co., 596 F.2d 99, 104 (4 Cir. 1979), cert. denied, _____ U.S. _____ (1979); Sledge v. J. P. Stevens & Co., 585 F.2d 625, 637 (4 Cir. 1978); Robinson v. Lorillard Corp., 444 F.2d 791, 803-04 (4 Cir. 1971). At this time and on this record, we do not pass on the government's contention that the district court impose hiring goals and timetables. We only call attention to Sledge v. J. P. Stevens &

---

[11] *Normally, a district court has discretion to deny injunctive relief to require record keeping, when the court is convinced that the transgressor will keep adequate records in the future. In this case, however, we find that the district court exceeded its discretion by refusing to issue a record keeping injunction. The County had a long history of inadequately maintaining employment records; it had stored applicant records in a shoe box and routinely destroyed them. This lax attitude toward compliance with the record keeping regulations made exact proof in this case more difficult, because the County data for 1974-77 were not available. The County began adequate record keeping practices only after the instigation of this litigation. On these facts, the district court should have taken steps to insure that the County would fulfill its record keeping obligations.*

Co., supra, where we have said that hiring quotas should be imposed only in the most extraordinary circumstances and where there is a compelling need.

B. The Disparate Impact Case

In order to prevail in a disparate impact case, a plaintiff need not show that a defendant acted with a discriminatory purpose. He need only show that a facially neutral employment practice has a discriminatory impact on members of a protected group. If that showing is made, use of the procedure is unlawful unless it is shown to be valid or otherwise required by business need. See, e.g., Dothard v. Rawlinson, 433 U.S. 321, 329 (1977); Griggs v. Duke Power Co., 401 U.S. 424, 430-32 (1971).

In the instant case we think that the government proved a prima facie case of disparate treatment of blacks in the County's use of hiring and promotion tests having a severe adverse impact on blacks in job categories which included 30% of the work force. Because defendants failed to establish, with possibly one exception, that the tests were properly validated to measure job performance, the use of these tests would appear to be in violation of Title VII. Washington v. Davis, 426 U.S. 229, 247 n.13 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Griggs v. Duke Power Co., 401 U.S. 424 (1971).

We decline, however, the Government's invitation to reach a final decision on this aspect of the case. There are many unresolved factual aspects of the disparate impact case, most particularly with regard to the proof offered by the County to rebut the government's showing of adverse impact. The district court has made no factual findings. We recognize that the County, except possibly with regard to the test for police corporal, offered no evidence of professional validation of the tests it empioys.[12/] Usually the starting point in proof of validity is evidence of a thorough job analysis. See Vulcan Society v. Civil Service Commission, 360 F. Supp. 1265, 1274 (S.D. N.Y.), aff'd., 490 F.2d 387 (2 Cir. 1973). And this proof is followed by demonstration that the test accurately and fairly measures the knowledge, skills, and abilities needed for successful performance of the job. See United States v. City of Chicago, 573 F.2d 416 (7 Cir. 1978); Kirkland v. New York State Department of Correctional Services, 374 F. Supp. 1361 F.2d (S.D. N.Y. 1973), aff'd in relevant part, 520 F.2d 420 (2 Cir. 1975), cert. denied, 429 U.S. 823 (1976); Vulcan Society v. Civil Service Commission, supra.

12/ *The defendants produced a validation study conducted in North Carolina for the police corporal test.*

Nonetheless, with these legal criteria as a guide, we think that the initial exploration of the factual mazes of the disparate impact case should be undertaken by the district court and not by us.[13]

Based upon the foregoing, we vacate the judgment of the district court and remand the case for further proceedings consistent with what we have stated.

VACATED AND REMANDED.

---

[13] *Consequently, we do not address the County's "bottom line" defense, by which it contends that sufficient numbers of blacks were hired even if the employment tests, which allegedly constitute only a part of the hiring process, were discriminatory. We pass no judgment on the theoretical validity of this defense and leave it in the first instance to the district court. The district court should examine the factual aspects of the County's defense closely, in light of the government's insistence that the figures on which it is based are suspect.* See note 8 supra

No. 80-541

In the Supreme Court of the United States

OCTOBER TERM, 1980

COUNTY OF FAIRFAX, VIRGINIA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

DREW S. DAYS, III
Assistant Attorney General

JESSICA DUNSAY SILVER
DAVID L. ROSE
ELLEN K. WAYNE
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-541

COUNTY OF FAIRFAX, VIRGINIA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTION PRESENTED

Whether the court of appeals erred in reversing, as based on insufficient evidence, the district court's rulings concerning the appropriate use of respondent's application flow analysis and petitioners' constructive labor force analysis as measurements of petitioner Fairfax County's labor market from 1974 to 1978.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	8
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Brotherhood of Locomotive Firemen & Enginemen v. *Bangor & Aroostook R.R.*, 389 U.S. 327	10
Hazelwood School District v. *United States*, 433 U.S. 299	8
Hester v. *Southern Ry.*, 497 F.2d 1374	8

Statutes:

Civil Rights Act of 1964, Title VII, 42 U.S.C. 2000e *et seq.*	10
Crime Control Act of 1973, 42 U.S.C. 3766(c) (to be recodified at 42 U.S.C. 3789d(c))	10
State and Local Fiscal Assistance Act of 1972, 31 U.S.C. 1242	10

PREVIOUS PAGE WAS BLANK

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. C1-C24)[1] is unofficially reported at 23 Empl. Prac. Dec. ¶ 31,117. The opinion of the district court (Pet. App. B1-B20 and Appendices) is unofficially reported at 20 Empl. Prac. Dec. ¶ 30,024.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 1980. A petition for rehearing was denied by the court of appeals on August 28, 1980. The petition for a writ of certiorari was filed on September 30, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In December 1978, the Attorney General filed suit on behalf of the United States alleging that petitioner Fairfax County, Virginia ("the County"), had engaged in a pattern or practice of discrimination against blacks and women in its employment practices. The complaint alleged both a failure to hire, assign, and promote blacks and women on the same basis as white males (disparate treatment) and the use of unvalidated selection procedures with a disparate impact on blacks and women. In addition, the complaint alleged that the County refused to supply the Department of Justice with information necessary to investigate the County's compliance with the

[1] The appendix to the petition contains the order of the district court, the opinion of the district court and the opinion of the court of appeals. It has not been paginated consecutively. Reference to the appendix in this brief will treat the order as Appendix A, the district court's opinion as Appendix B and the court of appeals' opinion as Appendix C.

nondiscrimination provisions of several funding statutes.

Undisputed evidence at trial showed that until January 1, 1978, after the initiation of the Justice Department's investigation of the County's employment practices on October 27, 1977, the County destroyed records showing the racial and sexual composition of the pool of applicants for County jobs (Pet. App. B3). This destruction of records concededly violated the County's record keeping obligations under federal law.

On the merits, the government's evidence showed that blacks constituted 5.5% or less of the employees in seven out of eight job categories,[2] but 28% of service/maintenance workers. Women constituted 24% or less of the employees in six of the eight categories, but 92% in clerical positions (Pet. App. C7). A comparison of the percentage of blacks and women who applied for positions with Fairfax County in 1978 in each of the eight job categories (applicant flow) with the percentages of blacks and women actually hired by the County from 1974-1978[3] showed disparities in the hiring of blacks in all eight job categories, six of which were statistically significant (see Pet. App. B11 n.6; DX 48; A. 962):[4]

---

[2] The job categories used for purposes of much of the analysis in this case are those adopted by the Equal Employment Opportunity Commission for state and local government reporting purposes. The categories are as follows: (1) officials and administrators, (2) professionals, (3) technicians, (4) protective service, (5) paraprofessional, (6) office/clerical, (7) skilled craft, (8) service/maintenance.

[3] Applicant flow figures for the years 1974-1977 were not available because of the County's destruction of records.

[4] "DX" and "PX" refer to defendants' and plaintiff's exhibits respectively. "A." refers to the appendix in the court of appeals.

1974-1978 Black Hires

EEO Category	Total Hires	Black Applicant %	Black Hires	Expected Black Hires [5]	Disparity in Standard Deviations
1 Officials	14	12.58%	1(7%)	2	—
2 Prof.	286	11.26%	20(7%)	32	2.28
3 Tech.	232	12.99%	13(6%)	30	3.35
4 Prot. Serv.	784	22.96%	81(10%)	180	8.40
5 Para-prof.	74	9.78%	4(5%)	7	—
6 Clerical	763	12.60%	44(6%)	96	5.69
7 Sk. Craft	243	13.52%	16(7%)	33	3.16
8 Serv./Maint.	793	19.57%	127(16%)	155	2.52

For women, the comparison showed hiring disparities against women in at least six of the eight categories [6] and statistically significant disparities in five categories (see Pet. App. B11 n.6; DX 49; A. 963):

1974-1978 Female Hires

EEO Category	Total Hires	Female Applicant %	Female Hires	Expected Female Hires [7]	Disparity in Standard Deviations
1 Officials	14	34.32%	4(28%)	—	—
2 Prof.	286	55.35%	97(34%)	158	7.29
3 Tech.	232	44.85%	72(31%)	104	4.23
4 Prot. Serv.	784	12.32%	114(15%)	97	—
5 Para-prof.	74	54.63%	22(30%)	40	4.31
6 Clerical	763	86.21%	684(90%)	658	—
7 Sk. Craft	243	6.89%	6(2%)	17	2.72
8 Serv./Maint.	793	10.54%	26(3%)	84	6.66

[5] Rounded to nearest whole number.

[6] The protective service category includes school crossing guards, a part time position filled overwhelmingly by women. Of the 114 female hires from 1974 to 1978, 58 were of school crossing guards (PX 1b). If those positions are eliminated, only 56 (7.1%) of the total hires for protective service jobs were female.

[7] Rounded to nearest whole number.

In addition, the United States presented evidence that tests given by the County, which were prerequisites for jobs constituting approximately 30% of the County's work force, had a statistically significant adverse impact on black employees (Pet. App. C11-C12).

The County produced no evidence rebutting the government's record keeping allegations. Against the government's allegations of discrimination in the hiring of blacks and women, the County introduced a statistical analysis of its labor market based upon the experienced and employed work force in 1970. This analysis determined, by using the zip codes of applicants' residences, the percentages of the County's black and women applicants in 1978 broken down by the eight job categories in six different geographic areas. Based upon figures from the 1970 Census that purported to show the percentage of black and female employed and experienced unemployed persons in each job category in each geographic area, the County derived constructive labor market "availability" statistics. A comparison of the County's labor market figures and its hires in each year from 1974 to 1978 showed significant disparities in the hiring of blacks in the protective service worker and service/maintenance categories in 1976 and 1977 and in the hiring of women in the service/maintenance category from 1974-1978 but did not show disparities in other categories (Pet. App. B14-B17).

With respect to its tests or other selection procedures, the County introduced evidence that it had commenced a validity study on its entry level examinations for law enforcement and fire fighter jobs, but did not offer any studies showing the validity of these or other examinations. Lastly, the County introduced extensive evidence as to its 1978 affirmative action

plan. The County had had a series of affirmative action plans since 1972 (Pet. App. C12, C17).

2. The district court found that the County had not maintained the records required by federal regulations before January 1, 1978 (Pet. App. B3, Appendix A I-VII). The court ruled, however, that no injunction was necessary to ensure further compliance with record keeping requirements (Pet. App. B4).

On the merits, the district court rejected the government's applicant flow data as being misleading for the 1974-1977 period on the theory that the County's 1978 affirmative action plan increased the percentage of blacks and women applying to the County in 1978 (Pet. App. B11-B13). The court also suggested that the plan might have resulted in an increased number of unqualified applicants (*id.* at B11). The court accordingly held that the applicant flow data did not establish a prima facie case (*id.* at B13). The court accepted the County's constructive labor force analysis, which was based upon the 1978 applicant data and the 1970 Census data, as the most accurate measurement of the black and female percentages of the County's labor pool (*id.* at B14-B16). Based upon this data the court found discrimination as to blacks in protective service and service/maintenance jobs in 1976 and 1977 and as to women in service/maintenance jobs for 1974-1978 (*id.* at B17-B18). The remedy imposed was a general injunction against discrimination in the hiring of women for service/maintenance jobs (*id.* at B20). The court concluded that no injunction prohibiting discrimination against blacks was necessary in light of the County's existing affirmative action program (*id.* at B19-B20).

With respect to the government's evidence that the selection procedures had a discriminatory impact, the court agreed that the County's law enforcement and firefighter tests had not been validated (Pet. App. B18). The court, however, gave no further consideration to the evidence (see *id.* at C13).

3. The court of appeals vacated and remanded (Pet. App. C1-C24). On the issue of record keeping, the court of appeals held that the district court should have granted injunctive relief requiring compliance with record keeping requirements and should have imposed periodic reporting requirements to enable it to monitor compliance (*id.* at C20-C21). With respect to the government's disparate treatment case, the court found unpersuasive the district court's reasons for rejecting the government's applicant flow data—that the County's 1978 affirmative action plan likely resulted in larger percentages of black and female applicants than in earlier years and that a larger proportion of those applicants might have been unqualified. First, the court noted that the County had had several affirmative action programs in place since 1972 and there was no reason to believe that the applicant flow in 1978 was significantly different from prior years. Second, there was no evidence in the record that a higher percentage of the 1978 applicants were unqualified, and even if the County could make such a showing, that was a matter to be proved on rebuttal; it did not alter the fact that the government had shown a prima facie case (*id.* at C16-C18). The court of appeals also held that the district court erred in finding the County's constructive labor force analysis to be a more accurate reflection of the 1974-1978 labor market for two reasons. First, the analysis relied on 1970

Census data that probably did not reflect actual conditions in 1974-1978. Second, the analysis used only the population figures for employed and experienced workers although many of the County's jobs require no prior experience (*id.* at C18-C19). The court thus concluded that the government had proved a "more extensive prima facie case than the district court recognized," but it declined to define "the exact contours of the case" (*id.* at C19).

Accordingly, the court of appeals vacated the judgment of the district court and remanded for findings as to the extent of the prima facie case of disparate treatment established by the government and for an assessment of any evidence adduced by the County in rebuttal. With respect to the government's disparate impact case, the court noted that the County had failed to offer any evidence of professional validation of its tests, with one possible exception (Pet. App. C19-C20, C22). The court, however, declined to reach a final decision on this aspect of the case and also remanded it to the district court for factual findings, particularly on the rebuttal evidence offered by the County (*id.* at C23-C24).

On September 5, 1980, the court of appeals denied a motion to stay the mandate pending disposition of this petition (Pet. 2). A similar motion to stay the mandate was presented to the Chief Justice, who denied it on October 9, 1980. However, on October 24, 1980, the district court stayed all proceedings on remand, including discovery, pending disposition of this petition.

ARGUMENT

Petitioners contend (Pet. 5-17) that the court of appeals' decision that the government's applicant flow analysis established a prima facie case of disparate treatment is contrary to this Court's decision in *Hazelwood School District* v. *United States*, 433 U.S. 299 (1977). This contention is without merit. Moreover, the interlocutory nature of the court's decision and the fact that it is closely tied to the specific facts of this case make the decision inappropriate for review by this Court.

1. The decision of the court of appeals is fully in accord with this Court's opinion in *Hazelwood School District* v. *United States*, *supra*. In *Hazelwood*, the Court directed the consideration on remand of a number of factors relevant to the determination of the racial composition of the school district's labor market. 433 U.S. at 310-312. Many of these factors concerned the geographic definition of the labor market because that was a critical issue in the controversy below. Consideration of the geographic factors was necessitated by the absence of any evidence as to the racial composition of the applicants, which the Court noted would be "very relevant" proof of the work force to be compared with the school district's hiring practices. 433 U.S. at 308 n.13. See also *Hester* v. *Southern Ry.*, 497 F.2d 1374, 1379 (5th Cir. 1974). Thus, as the court of appeals noted (Pet. App. C16), its reliance on applicant flow data was in accordance with the guidelines of *Hazelwood*.

The disagreement between the court of appeals and the district court in this case is not over the legal question of the relevance of applicant flow information. Indeed, the County's geographic labor force analysis was itself based upon 1978 applicant flow

data (see Pet. App. B15). The major disagreement concerned what legitimate inferences could be drawn from the 1978 records and applied to the racial and sexual composition of applicants from 1974-1977, when the County had unlawfully destroyed the records that would have directly showed that information. This question, as is apparent from petitioners' numerous references to the record (Pet. 7-9, 13-16), turns upon the sufficiency of the evidence to support the district court's conclusions. No legal issue is presented that warrants this court's review.

In any event, the court of appeals correctly found that there was no adequate basis for the assumption that the County's 1978 affirmative action plan caused a higher black and female applicant flow in that year than had existed from 1974 to 1977. The court noted that the County had had affirmative action programs since 1972, that some of the features of the 1978 plan were continuations of earlier programs, and that some of the earlier affirmative action efforts had actually been discontinued by 1978 (Pet. App. C17).[8] In addition, the court correctly found no basis in the record for assuming that 1978 black and female appli-

---

[8] The statistics cited by petitioners (Pet. 7-8) do not conflict with the court of appeals' opinion. Evidence of an increase in black certifications from the Fairfax County Office of Personnel to the Police Department reflects a change in the manner of processing and certification of black applicants by the personnel office (A. 399) rather than a change in the number or percentage of blacks applying to the personnel office for police officer positions. Police minority recruitment efforts involving black colleges (A. 758-760), media advertising (A. 764-765), and special testing procedures (A. 765) were all originated prior to 1978. Even in 1978, only four of 57 police officers hired by the County were black (PX 2e at code 4118C).

cants were more likely to be unqualified than white male applicants. Thus, as the court of appeals held, the district court erred in ruling that the government had not established a prima facie case of disparate treatment. Moreover, given the conceptual [9] and procedural [10] flaws in the County's work force analysis, the court of appeals correctly concluded that the district court erred in finding that analysis to be preferable to the applicant flow analysis.

2. Apart from the merits of the court of appeals' decision, it is clearly not ripe for review at this time. The case has been remanded to the district court for further proceedings that may obviate any necessity for further review. Accordingly, review by this Court would be premature. See *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967). Moreover, petitioners have not challenged that portion of the court of appeals' opinion remanding for further findings on the prima facie case of disparate impact that has been estab-

---

[9] The County relied upon 1970 Census data of persons employed and experienced at that time. That data reflects the discriminatory patterns of employment then in existence, which necessitated the enactment in 1972 of the amendments to Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and the non-discrimination provisions of the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. 1242, and the Crime Control Act of 1973, 42 U.S.C. 3766(c) (to be recodified at 42 U.S.C. 3789d(c)). Moreover, those figures are of no relevance for most entry level County jobs, which do not require prior experience (Pet. App. C18-C19).

[10] The derivation of the data supporting the County's analysis was not explained, and the person who prepared them did not testify (Pet. App. C19 n.10). The government's first opportunity to examine the demographic data on which this analysis was based came after the close of discovery, and the exhibits submitted contained no reference to the source of the data (see A. 1718-1745).

lished by the government. Whatever the disposition of this petition, the disparate impact case provides an independent basis for a remand and may ultimately provide a basis for relief ordered in this case irrespective of the issues raised by this petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

DREW S. DAYS, III
Assistant Attorney General

JESSICA DUNSAY SILVER
DAVID L. ROSE
ELLEN K. WAYNE
Attorneys

NOVEMBER 1980

☆ U. S. GOVERNMENT PRINTING OFFICE: 1980 332278 118